Supreme Court U.S.
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No. 02-759

IN THE

Supreme Court of the United States

BLUE RIBBON PROPERTIES, INC.,
DOING BUSINESS AS LONG HOLLOW LANDFILL,

Petitioner,

v.

HARDIN COUNTY FISCAL COURT, HARDIN COUNTY, KENTUCKY; and HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the County's action represented a compensable taking of Petitioner's property.

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COUNTERSTATEMENT OF THE CASE AND FACTS

Respondents strongly disagree with Petitioner's interpretation of the facts.

The Petitioner owns property in Hardin County, Kentucky. The Hardin County Fiscal Court ("Fiscal Court") is the governing body of Hardin County and supervises the solid waste management area which includes Hardin County and Fort Knox, Kentucky. The Hardin County Planning and Development Commission ("Planning Commission") administers planning and zoning ordinances in Hardin County. The Natural Resources and Environmental Protection Cabinet (the "Cabinet") is an agency of the Commonwealth of Kentucky with powers and duties regarding the licensing of waste disposal sites in Kentucky.

In 1989, the Petitioner purchased approximately 590 acres in Hardin County for purposes of building a solid waste landfill.[1] In October 1989, the Petitioner submitted the required, but separate from any local application, state landfill construction and operation permit application to the Cabinet as well as the separate and distinct conditional use application to the Planning Commission. These are both separate and distinct permits which are required to get approval for a landfill. After extensive hearings, the Planning Commission voted to deny the application on February 5, 1991. The Petitioner appealed the decision to the Fiscal Court, which affirmed the denial in March of 1991.

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1. Respondents strongly object to Petitioner's insinuations that it directly solicited bids for a landfill and/or in anyway encouraged Petitioner to consider developing a landfill. Rather, Respondent simply placed a general ad for proposals (not geared to any particular project) in the local newspaper to which Petitioner responded.

The Petitioner subsequently filed suit on the basis of such denial in the Hardin Circuit Court, Hardin County, Kentucky seeking a: (1) declaration that the zoning ordinance and actions of the County thereunder were unlawful; and (2) damages under 42 U.S.C. § 1983. On April 2, 1993, the Hardin Circuit Court ruled in favor of Petitioner declaring the ordinance invalid and vacating the Fiscal Court's denial of Petitioner's conditional use application. The Hardin Circuit Court found on behalf of the County on Petitioner's § 1983 claim which was not appealed.

During the pendency of the above-referenced lawsuit, the Kentucky General Assembly passed legislation in 1991 requiring each County to prepare a solid waste management plan and to name the facilities available for solid waste disposal. In response to this mandate, the county crafted Part 1 of the Hardin County Solid Waste Management Plan and undertook to develop a landfill project of its own which included the purchase of acreage in order to develop the landfill. The Plan noted the rejection of Petitioner's application by the Planning Commission and Fiscal Court inasmuch as, at that time, Petitioner's lawsuit on the denial had not yet been decided. Thus, the undisputed facts are that during the state mandated time frame that the county had to develop and submit a solid waste management plan, the Petitioner's application had been denied and thus could not be submitted as a disposal option under the waste management plan and the county, in order to comply with the state mandate, was required to and did pursue other options which was the development of its own landfill.

The Kentucky Court of Appeals eventually affirmed the Hardin Circuit Court's ruling on the zoning ordinance. The Kentucky Supreme Court denied the Fiscal Court's request for discretionary review on May 31, 1995.

The Kentucky Supreme Court having denied review, Petitioner for the first time then submitted a request to the Fiscal Court to determine if its proposal for the landfill was consistent with the Solid Waste Management Plan. On July 24, 1995, the Fiscal Court rejected Petitioner's permit citing incompatibility of the project with the County's Solid Waste Management Plan.[2] The Cabinet indicated it would not be able to approve Petitioner's construction and operation permit application on the grounds it was not consistent with the state's Solid Waste Management Plan.

Petitioner subsequently initiated suit in the U.S. District Court alleging that the County's actions amounted to a regulatory taking of its property, that it denied Petitioner's constitutional rights of due process and equal protection, that the County had combined with the Cabinet to restrain or monopolize trade, unlawful discrimination against interstate commerce, violations of the commerce clause and that such actions were actionable as tortuous interference under Kentucky law.

As noted by Petitioner, the District Court initially dismissed the Cabinet on grounds of Eleventh Amendment immunity and also dismissed all of Petitioner's claims against the County except for its Sherman Antitrust claims. Petitioner subsequently amended its complaint to assert a state law inverse or reverse condemnation claim and on August 28, 2000, the District Court entered summary judgment on behalf of the County dismissing Petitioner's claims finding that the

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2. The now declared unconstitutional zoning ordinance was no longer a consideration in the rejection of Petitioner's new application, the only issue now being its incompatibility with the Solid Waste Management Plan.

reverse or inverse condemnation claims failed because Petitioner had not been denied all beneficial enjoyment/use of its property.

Petitioner appealed to the Sixth Circuit which affirmed the dismissal by the U.S. District Court. Petitioner now moves this Court for Writ of Certiorari only as to its takings claim.

REASONS FOR DENYING THE PETITION

Once again, the Petitioner has failed to demonstrate that any "taking" of its property occurred and/or any justification for this Court to review the Sixth Circuit's affirmation of the trial court's award of summary judgment.

Essentially, the Petitioner asserts that because it has been unable to build the landfill in Hardin County, Kentucky that Respondent has committed reverse and/or inverse condemnation of its property. Petitioner again relies upon the case of *Commonwealth of Kentucky and Natural Resources v. Sterns Coal and Lumber Company*, Ky. 678 S.W.2d 378 (Ky. 1984) in conjunction with *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) to support its argument that certain factors were met to implicate that the taking of the subject property had occurred. As at the trial and appellate level, the Petitioner fails in this regard to establish any basis for this Court to examine its holdings in such regard. In *Sterns*, the court acknowledged that had the underlying Kentucky Wild Rivers Act been fully executed, a taking could have occurred. This is so because, as the Court noted, under that, "[t]he land had to remain practically untouched and in a primitive natural state." *Sterns* at 381. This is consistent with the Court's

general statement that a legal taking occurs when there is "entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment." *Id.* No such "legal taking" occurred here.

Not only has Petitioner's property not been devoted to public use at all, but the beneficial uses to which Petitioner could put its property, if it so chose, are legion. Such uses include agricultural, horticultural, and forestry purposes as well as the possibility of using the area as a park or playground, among many other uses, as recognized by the appellate court.

Additionally, Petitioner's own damage expert admitted that in the early 1990's, the property had a value of approximately $600,000; that the primary land use in the area of Petitioner's property was agricultural; that, "[t]he area has seen few significant changes in the past decade" and that the area in which the Petitioner's property is situated continues to be available for use for agricultural purposes. Thus, the property not only is valued the same or higher but could be put to the same use now as it was when purchased by Petitioner, specifically agricultural.

Notwithstanding the foregoing, the Petitioner continues to contend that this case fits within the *Sterns/Penn Central* elements of inverse condemnation. Specifically, the Petitioner asserts that element (1) the economic impact of the law on the claimant is in its favor. In support, Petitioner asserts, in essence, that because it was not able to develop a landfill on its property it has realized a significant monetary loss.

First, it is speculative at best for appellant to claim that, but for the County's actions, the Cabinet would have allowed Petitioner to develop a landfill in Hardin County. Petitioner cites no evidence of record, nor can it, to predict the Cabinet's

position on whether or not it would have approved or disapproved its submission. Also, despite Petitioner's expert's conclusions to the contrary, whether Petitioner would have realized the kind of profit alleged on the operation of such landfill is also purely speculative. Finally, any monies Petitioner may have advanced in pursuing the permit were done at his own risk as he knew the same would require both County **and** Cabinet approval. Any actions taken by it prior to resolution of its underlying claim challenging the constitutionality of the zoning ordinance and/or prior to County or Cabinet approval were a risk and premature on it's part. It is certainly not due to the insistence of Respondents.

Additionally, Kentucky law is clear that even if Petitioner could establish a legal taking, the measure of damages is determined by use of the same formula as in an eminent domain action, the measure of damages specifically being the "difference in the fair market value of the total tract of land immediately before and immediately after the taking." *Eades, Ky. Law of Damages*, (3rd Edition) § 17-19 (quoting *Usher and Gardner, Inc. v. Mayfield Independent Board of Education*, 461 S.W.2d 563 (Ky. 1970)). Additionally, Petitioner's arguments that the property would have been more valuable had it been developed as a landfill are not persuasive for this Court to adopt review. Kentucky's highest court has recognized that "if there is one thing about which there seems to be unanimity of opinion on this subject, it is that the injury to business or loss of profits is not a proper element of compensation for land taken in condemnation proceedings." *City of Newport Municipal Housing Commission v. Turner Advertising, Inc.*, 334 S.W.2d 767 (Ky. 1960). Petitioner thus fails to establish the first element of the *Sterns* and/or *Penn Central* cases is in its favor.

Petitioner also again relies on the case of *Lucas v. South Caroline Coastal Council*, 505 U.S. 103 (1992) in support of its contention that the second *Stern/Penn Central* factors, specifically interference with reasonable investment backed expectations, are met. Once again, this provides no support for Petitioner's contentions. In *Lucas*, the Supreme Court affirmed the principals set forth in *Sterns* stating:

> We think, in short, there are good reasons for our frequently expressed belief that we know our real property has been called upon to sacrifice all economical beneficial uses in the name of the common good, that is, to leave his property economical idle, he has suffered a taking.

Lucas at 1020. Throughout this opinion, the Court refers to the "taking" necessary to constitute a "legal taking" as one that deprives the owner of all beneficial uses and enjoyment of property or a "total taking". *Lucas* at 1015, 1018, 1027 and 1030.

Petitioner had testified in the underlying action that he has recognized income from the subject property since he has purchased it. The Petitioner leases his property for agricultural purposes and receives $2,500 a year on that lease and also has billboards on the property which generate an income of approximately $10,000 to $12,000 per year. The property also has timber on it and Petitioner has testified that there are approximately 60 to 100 acres suitable for farming with a proximate tobacco base of 30 acres.

Additionally, the subject property owned by Petitioner is currently zoned as a Rural Residential District for which there are some 20 uses which do not require a zoning

amendment, including single family dwellings, parks and playgrounds, agricultural, forestry, horticulture, and, as noted by Petitioner's own damage expert, agricultural.

Petitioner further asserts that Respondents' actions were arbitrary and unreasonable and fail to promote the common good. This too is simply incorrect. Respondent undertook a multi-year process, in response to a Kentucky Statutory Mandate, to provide for the disposal of solid waste in the County. There has been absolutely no showing by the Petitioner that the process engaged in by Respondent, and/ or the Cabinet, in considering Petitioner's application was arbitrary or unreasonable. It must be noted that the Cabinet approved the Respondent's Solid Waste Management Plan and implicitly found that the same promoted the common good in that Respondent's plan would "protect the pubic health and welfare, to prevent the spread of disease and creation of nuisances, conserve our natural resources and enhance the beauty and quality of our environment." KRS 224.43-101(1).

There can be no serious doubt but that developing a system for the disposal of solid waste furthers a substantial public purpose and constitutes a valid exercise of police power and that where property is regulated as a valid exercise of police power, such regulation does not constitute a taking. *Sales, Inc. v. Warren County Water District*, 984 S.W.2d 490 (Ky. App., 1998) and *Eastern Kentucky Resources v. Arnett*, Ky. 934 S.W.2d 270 (Ky. 1996).

Petitioner has offered absolutely no authority to support his claim of taking or to justify this Court's review of this matter. Existing case authority is clear and supports the Sixth Circuit affirmation of the trial court's dismissal of Petitioner's claim. The Petition for Writ of Certiorari is without merit and should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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